No. 73-1115

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MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1973

LEE PRICE, INDIVIDUALLY, AND d/b/a PRICE'S LIVESTOCK MARKETING COMPANY, PETITIONER

v.

PETER J. BRENNAN, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

WILLIAM J. KILBERG,
Solicitor of Labor,

CARIN ANN CLAUSS,
Associate Solicitor,

SYLVIA S. ELLISON,
MELANIE F. NUSSDORF,
Attorneys,
Department of Labor,
Washington, D.C. 20210.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B, A-7 to A-11) is not yet reported. The memorandum opinion of the district court (Pet. App. A, A-1 to A-6) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 19, 1973. The petition for a writ of certiorari was filed on January 17, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in view of petitioner's failure to establish that the wage arrangement with one of his employees met the statutory requirements for the limited overtime exception provided in Section 7(f) of the Fair Labor Standards Act, the court of appeals correctly held that he had violated the Act's overtime provisions by paying the employee in question a flat weekly salary for all hours worked, including those in excess of 40 per week.

STATUTE INVOLVED

The pertinent provisions of the Fair Labor Standards Act of 1938, 52 Stat. 1060, as amended, 29 U.S.C. 201, *et seq.*, including its exception for certain guaranteed wage agreements (29 U.S.C. 207(f)), are set forth in the petition (Pet. App. C, A-12 to A-14).

STATEMENT

This action was brought by the Secretary of Labor under Section 16(c) of the Fair Labor Standards Act of 1938, as amended, pursuant to the written request of one employee, Eddie Dodson, to recover unpaid overtime compensation due to him from petitioner. The parties stipulated that the only issues for decision by the trial court were (1) the number of weekly overtime hours worked by Dodson, and (2) a determination of any unpaid overtime compensation due to him for such hours (Pet. App. A, A-1).

It is undisputed that petitioner did not keep, maintain or preserve a record of the hours worked each workday and each workweek by Dodson, as required by the Act, and that such payroll records as he had kept for this employee simply showed that he was paid a weekly

salary of $100 and that it was reduced by one-sixth when Dodson missed a day of work (Pet. App. A, A-5; Pet. App. B, A-9).

Since there were no records by which Dodson's hours of work could be established, the district court found, on the basis of petitioner's testimony, that he worked from 50 to 55 hours per week, but never more than 55 in any given week (Pet. App. A, A-4).

On the second issue, the court held that Dodson was not entitled to any overtime compensation since his weekly salary was sufficient to cover the statutory minimum of $1.60 per hour and time and one-half the minimum for all hours worked overtime up to and including 55 a week. In so holding, the trial court made no reference whatsoever to the limited overtime exception provided in Section 7(f) of the Act for certain wage agreements with employees whose duties "necessitate irregular hours of work."

In reversing, the court of appeals accepted all of the trial court's findings of fact, but held that they were not sufficient, as a matter of law, to establish a "contract which explicitly made $1.60 per hour the 'regular rate' for purposes of 29 U.S.C. §207(a)(1)" (Pet. App. B, A-8). The court referred at length to petitioner's conversation with Dodson in which he told him that "I will start you out at $100.00, because we have got to stay within the minimum wage" (*ibid.*),[1] and noted that "the rates per hour were [not] mentioned in the con-

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[1] According to petitioner, he originally planned to pay Dodson $85 a week, but instead paid him $100, "whether he worked forty hours or whether he worked fifty-five," because he wanted "to stay within the minimum wage law" (Pet. App. B, A-8). If, as petitioner's testimony indicates, it was expected that Dodson

versation * * *," and that "the district court did not so find" (Pet. App. B, A-8 to A-9). Unlike the trial court, the court of appeals examined Section 7(f) of the Act and concluded that the type of contract contemplated by it is one "which specifies a regular rate of pay of not less than the statutory minimum hourly rate, and time and a half for overtime" (Pet. App. B, A-10). As the court noted, neither element was present here. The court of appeals also noted that Section 7(f) or the "so-called *Belo* exception" has been held inapplicable to a case like the present one where the hours of work, although fluctuating, are always in excess of 40 per week (Pet. App. B, A-10).

ARGUMENT

1. Contrary to petitioner's assertion, the decision below does not hold that an oral or informal wage arrangement can never meet the requirements of Section 7(f) of the Act, but rather that the conversation which petitioner had with the employee did not result in an "explicit understanding" concerning a stated hourly rate for regular work. "Implication" as this court noted in *Overnight Motor Co.* v. *Missel*, 316 U.S. 572, "cannot mend a contract so deficient in complying with the law" (316 U.S. at 581).[2]

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would normally work a 55-hour week, $85 would not have yielded him the prescribed minimum hourly rate of $1.60 but only $1.545 an hour ($85 divided by 55). When this fact is borne in mind, the increase in salary—which so impressed the district judge that he accepted petitioner's version of it as "probably correct" (Pet. App. A, A-2)—is easily understood.

[2]It is, of course irrelevant that the employee's salary was sufficient to cover the bare statutory minimum and time and one-half the minimum for a 55-hour workweek. As this court also noted in *Overnight Motor Co., supra*, "[t]he provision of §7(a) requiring this extra pay for overtime is clear and unambiguous. It calls for 150% of the regular, not the minimum, wage" (316 U.S. at 577).

Nor did the court of appeals hold that petitioner's failure to observe the Act's recordkeeping requirements would, standing alone, constitute a basis for the recovery of overtime compensation under the Act, as petitioner asserts (Pet. 8-9). Petitioner's failure to keep records, however, confirms the lack of any explicit understanding concerning a regular hourly rate of pay.

2. In any event, as the opinion below recognizes, it has long been the administrative construction, upheld in *Foremost Dairies, Inc.* v. *Wirtz*, 381 F. 2d 653 (C.A. 5), certiorari denied *sub nom. Home Town Foods, Inc.* v. *Wirtz*, 390 U.S. 946, that the Section 7(f) "exception does not apply to a case like the present one, where the total hours of the work week, although varying, are in excess of forty" (Pet. App. B, A-10). This principle, which independently supports the judgment below, is not challenged in the petition.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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